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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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OCTOBER TERM, 1953

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THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief in opposition contends that the petition for a writ of certiorari was not filed within the statutory period. The principal basis for this contention is this Court's decision in *Federal Trade Commission* v. *Minneapolis Honeywell Regulator Co.*, 344 U. S. 206. That case, however, is wholly inapposite.

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, within 30 days of the entry of the original judgment, the Government filed a motion for rehearing. This motion was timely filed. Rule 53 (c) of the Court of Claims. On

March 3, 1953, the court denied the motion with an opinion. (R. 19.) The petition for a writ of certiorari was filed May 29, 1953.

Respondent contends that, inasmuch as the Court of Claims did not vary the terms of the November 4 judgment when it denied the motion for rehearing, the time within which the petition for writ of certiorari could be filed begar to run on November 4 and expired February 2, 1953. It is urged, therefore, that under *Minneapolis Honeywell* the petition is out of time.

But *Minneapolis Honeywell* did not deal with a timely motion for rehearing in the court below (cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 19–20, n. 1, p. 21), and did not purport to change the long established rule that timely motions for rehearing toll the time for filing a petition for certiorari until 90 days after the disposition of the rehearing motion. *Department of Banking* v. *Pink*, 317 U. S. 264, 266; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149–150; *Morse* v. *United States*, 270 U. S. 151; cf. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137. Here, where the motion for rehearing was timely filed in the Court of Claims, the 90 day period did not commence until the decision of that court on March 3, 1953, and did not expire until June 1, 1953. As the petition for certiorari was filed May 29, it was timely.

The petitioner, Federal Trade Commission, in the *Minneapolis Honeywell* case attempted to sustain the timeliness of the petition for a writ of certiorari on two well settled rules: (1) that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely petition, and (2) that when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed. This Court's decision did not question the correctness of these two general propositions but held them to be inapplicable to the facts of that case. Reliance upon the first proposition was held by this Court to be misplaced because the untimely memorandum filed by the Federal Trade Commission in the Court of Appeals neither sought a rehearing nor an amendment of the previous judgment in respect to the one matter controverted in the Court of Appeals and decided by the Court of Appeals in the first judgment. The second proposition was held inapplicable because the later judgment entered by the Court of Appeals reiterated, without change, everything which had been decided in the earlier judgment on the one controverted matter. Here, on the other hand, the motion for rehearing was timely filed; it was directed specifically to the matter now in contro-

versy in this Court; it was argued orally before the court; it was fully considered by the court on its merits and disposed of by a supplemental opinion; and the petition for writ of certiorari is directed toward precisely the same judgment as to which the motion for rehearing was denied.

The petition for a writ of certiorari was timely filed.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

JULY 1953.

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